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No. 321

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 19-25) is reported at 278 F. 2d 282. The decision and order of the Board (J.A. 37-46)[1] are reported at 123 NLRB 1547.

[1] References are to the portion of the record printed as a Joint Appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decree of the court below was entered on May 18, 1960 (Pet. 27-28). The petition for a writ of certiorari was filed August 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) and (f) of the National Labor Relations Act (61 Stat. 146, 29 U.S.C. 160 (e) and (f)).

QUESTION PRESENTED

Whether the Board properly concluded on this record that, by picketing the premises of an employer with which it was engaged in a labor dispute at an entrance reserved exclusively for independent contractors and their employees who were working on the premises, the union intended to induce those employees to engage in a concerted refusal to perform services with an object of forcing a cessation of business between their employers and the primary employer, in violation of Section 8(b)(4)(A) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act in effect during the events of this case are set forth at pp. 29-30 of the Petition.[2]

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[2] Unless otherwise specified, Section 8(b)(4)(A) refers to the provision as it read prior to the 1959 amendments to the Act.

STATEMENT

A. The Board's findings

The General Electric Company is engaged in the manufacture of household appliances at its plant known as "Appliance Park," located about ten miles from Louisville, Kentucky (J.A. 38; 51, 57). The operation requires retooling and revamping of the manufacturing facilities for model changes as well as considerable maintenance, installation, repair and alteration work of various types (J.A. 13, 14, 38; 55-57). Because its maintenance division lacked either the necessary skills or sufficient manpower to perform these diversified functions, the company contracted with local concerns for the needed services (J.A. 38; 55, 56).

On July 27, 1958, when the strike against the company described *infra* started, agreements were outstanding with twelve independent contractors. Six of them had already commenced work on such major projects as construction of a mezzanine floor on a building, a truck dock, and an air shelter, and rearranging a conveyor line (J.A. 39; 121, 122, 127-130, 131). Some of the contractors had maintained business relations with the company for a period of years, one, for example, for five or six years with a force that varied from one to fifty men. At the time of the strike some of the contractors' employees had been at the plant a year or more (J.A. 39; 80-81, 90, 100-104).

A large ditch surrounds the company's property so that access to the plant by vehicular traffic is limited

to five roadways across culverts which are designated as "gates" and are numbered 2, 3, 3-A, 4 and 5 (J.A. 13, 36, 38; 51, 52, 65, 170-171). Rules of the company required its employees to use gates 2, 3, 4 and 5 but not gate 3-A, and limited the independent contractors, their employees, and suppliers to entry at gate 3-A (J.A. 17, 39, 40, 42; 51, 52, 54-55, 69-70, 72, 100, 103, 107, 113, 118-119, 187-188; 189). Over a period of years, jurisdictional and other labor disputes had resulted in numerous strikes at the plant, in which employees of the independent contractors had participated. By restricting the use of gate 3-A to such employees and prohibiting the company's personnel from using that entrance, the company sought to minimize the impact of the picketing at the other entrances on the neutral employees (J.A. 39; 66-67, 179-181). In January, 1958, a sign was posted at gate 3-A which read as follows:

GATE 3-A
FOR EMPLOYEES
OF CONTRACTORS
—ONLY—
G.E. EMPLOYEES
USE OTHER GATES

Similar signs have been posted at that entrance since 1953 (J.A. 40; 52-53, 170-171).

Moreover, written instructions were issued to the plant guards on January 20, 1954, limiting that entrance to independent contractors and their employees (J.A. 39; 59, 179-187). Unless recognized by the guards, passengers in a vehicle entering gate 3-A

were required to identify themselves as contractor personnel, and a check was made against registration cards maintained at the guardhouse for this purpose (J.A. 40; 69, 71, 73-74, 114-115). A person applying at the wrong gate was obliged to turn back and seek admission at the correct gate (J.A. 40; 52, 55, 71, 107, 109-110).

On July 27, 1958, petitioner union called a strike of the company's own employees, and pickets were stationed at all entrances to the plant including gate 3-A (J.A. 13, 38, 41; 49, 61, 133). The pickets carried signs reading (J.A. 41; 49, 132-134, 170-171):

LOCAL 761
ON STRIKE
G.E. UNFAIR

In addition to the picketing, oral appeals were made to the employees of the independent contractors not to cross the picket line (J.A. 41). Employees of one company seeking to enter at gate 3-A in order to report to work were told to "go home" (J.A. 41; 105-106). The driver of the car pointed to his contractor's identification sticker but the pickets "didn't ask me anything, shook their heads, and that was all" (J.A. 78). When employees of another contractor attempted to enter at gate 3-A, they were told by a picket they could not go in (J.A. 96-97). In order to get their tools, they were required to obtain a pass at the union hall (J.A. 97-99). Because officials of a third contractor feared its contract would be cancelled unless work was continued, conferences were held with representatives of the petitioner in an en-

deavor to obtain permission for its employees to complete the project. Permission was not given and the employees of this contractor refused to resume work until conclusion of the strike (J.A. 87-89, 90-94).

Most, if not all, of the employees of independent contractors respected the picket line at gate 3-A (J.A. 17, 41; 63, 87, 89, 94, 132). Picketing at that entrance was discontinued August 9, 1958, pursuant to a temporary restraining order issued by a federal district court. The next day the strike was called off and all picketing ceased (J.A. 41; 49, 133, 134).

B. The Board's conclusions and order

On these facts, the Board concluded that the petitioners' picketing at gate 3-A, which was known to be restricted to the use of the employees of the independent contractors working on the premises, was designed to induce concerted work stoppages by the employees of those neutral employers and thus to force the independent contractors to cease doing business with the company. Accordingly, the Board held that the picketing at gate 3-A was not legitimate primary activity, but rather secondary activity proscribed by Section 8(b)(4)(A) of the Act. The petitioner was ordered to cease and desist from the unfair labor practices found and to post appropriate notices. (J.A. 42-43.)

C. The decision of the Court of Appeals

The Court of Appeals held that, on this record, the Board was warranted in concluding that the picketing at gate 3-A violated Section 8(b)(4)(A) of the Act.

The court therefore enforced the Board's order in full. (Pet. 19-25.)

ARGUMENT

The decision below is correct, does not conflict with that of any other court of appeals, and presents no issue warranting review by this Court.

1. Section 8(b)(4)(A) of the Act has "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. 675, 692. The section was not intended to proscribe so-called primary picketing, even though it has the incidental effect of inducing employees of secondary employers to cease work. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665. Where the primary employer and neutral employers are working at the same premises, the fundamental issue is whether the picketing was confined, as nearly as practicable, to the primary employer and his employees, or whether it was aimed at the secondary employer and his employees. If the former, the picketing is legitimate primary activity; if the latter, it is for an object proscribed by Section 8(b)(4)(A).[3]

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[3] See *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694; *National Labor Relations Board* v. *Local Union*

On the record here, the court below was correct in sustaining the Board finding that the union's picketing at gate 3-A was for an illegal, secondary object. Although the premises were owned by the company, the independent contractors were engaged in regular and long-term projects there and, accordingly, were entitled to be shielded at that work place "from pressures in controversies not their own" (*Denver Building Trades Council, supra*). Instead of minimizing the impact of the picketing on the neutrals and their employees, the union went out of its way to enmesh them in its dispute with the primary employer. Although its picket lines at the other gates afforded an adequate opportunity to further its primary strike, the union deliberately extended the picketing to gate 3-A, which was used only by the employees of the neutral contractors. Moreover, by direct appeals to those employees at that gate, the pickets left no room for doubt that the picketing there was aimed at the contractors and their employees. In these circumstances, the Board was amply justified in concluding that the picketing at gate 3-A exceeded the bounds of legitimate primary activity, and fell under the ban of Section 8(b)(4)(A) of the Act.

No. 55, 218 F. 2d 226 (C.A. 10); *Retail Fruit and Vegetable Clerks Union* v. *National Labor Relations Board*, 249 F. 2d 591 (C.A. 9).

The 1959 amendments to the Act do not contradict the foregoing analysis, but, indeed, specifically recognize the primary-secondary distinction by providing that "nothing contained in this clause (B) [which contains the old Section 8(b)(4)(A)] shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing" (Pet. 13).

2. Contrary to the petitioner's contention (Pet. 7-9), the decision below is not in conflict with *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665. In that case, this Court held that Section 8(b)(4)(A) did not proscribe picketing at the primary employer's plant, and appeals by the pickets, which had the effect of inducing the driver of a truck to discontinue a pending trip to the plant. The Court, noting that Section 8(b)(4)(A) banned only the inducement of concerted employee action, concluded that a "union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees" (341 U.S. at 671)). It added that Congress, by Section 8(b)(4)(A), did not seek to interfere with the ordinary strike, and the conduct which occurred "was no more than traditional and permissible in a primary strike" (*National Labor Relations Board* v. *Denver Building Trades Council*, 341 U.S. at 687). The situation here is clearly distinguishable in that the neutral employees did not just "happen to approach the picketed place of business", but rather the picketed premises was their regular work place as well as that of the primary employees. Accordingly, though here, as in *Rice Milling*, the picketing was confined to premises owned by the primary employer, this factor is not dispositive of its legality. As *Rice Milling* itself points out, the "limitation of the complaint to an incident in the geographically restricted area near the mill is sig-

nificant, although not necessarily conclusive" (341 U.S. at 671).[4]

Similarly, the situation here is distinguishable from that in *Local 618, Automotive Employees Union* v. *National Labor Relations Board*, 249 F. 2d 332 (C.A. 8) (Pet. 10-11). There, as here, the union picketed the primary employer's premises at a time when the employees of secondary employers were at work there. However, unlike here, there was nothing in the union's conduct which indicated an intent to enmesh the secondary employer and his employees in the dispute, other than the fact that the union continued to picket even after the primary employees had temporarily been removed from the premises. On the basis of this fact alone, the Board concluded that lawful primary picketing had been converted into illegal secondary activity, and thus banned all picketing at the primary premises. The Eighth Circuit's holding that the temporary removal of the primary employees

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[4] Nor is a different conclusion required by the so-called picketing proviso to Section 8(b)(4), cited by the petitioner (Pet. 17). Although this proviso has not as yet been specifically construed by the Board (but see the report of the Trial Examiner in *Interborough News Co.*, 90 NLRB 2135, 2146-2149) its decision here is an implicit holding that the proviso is inapplicable. Thus the proviso, at best, merely permits a refusal to cross a primary picket line. If, as the petitioner implies, the mere fact that the primary employer is on the premises is sufficient to bring into play the protection of the proviso, all of the cases in which violations of Section 8(b)(4)(A) have been sustained with respect to picketing occurring at premises occupied jointly by the primary employer and neutral employers (see n. 3, *supra*) would be thrown into question. Since, as we have shown, the picketing at gate 3-A was properly found to be secondary and not primary, the proviso would not privilege it.

was not sufficient to destroy the primary character of the picketing does not preclude a contrary conclusion where, as here, the Union, although afforded an adequate opportunity to engage in primary picketing at other gates on the premises, deliberately extended its picketing to a gate used only by neutral employees.

3. That several cases involving separate plant gates have arisen, does not, as the petitioner suggests (Pet. 14-15), add to the importance of the present decision. The circumstances of the picketing and of the establishment of the separate gate in those cases are not the same as those in this case, and accordingly they turn on their own facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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